



Approved For Release 2005/12/24 : CIA-RDP81M00980R001600120069-7  
EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503  
OMB  
CLC #78-1506

April 10, 1978

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer  
  
Central Intelligence Agency  
Department of State  
Nuclear Regulatory Commission  
Department of Energy

SUBJECT: DOD's proposed report on H.R. 3564 (and S. 1720)  
re modification of the APA's "military or foreign  
affairs" exemption.

The Office of Management and Budget requests the views of  
your agency on the above subject before advising on its  
relationship to the program of the President, in accordance  
with OMB Circular A-19.

A response to this request for your views is needed  
no later than cob, Wednesday, April 19, 1978.

Questions should be referred to Robert Carlstrom  
( 395-3856 ) or to -----  
the legislative analyst in this office.

*James B. MacRae*  
James B. MacRae for  
Assistant Director for  
Legislative Reference

Enclosures  
cc:



DEPARTMENT OF DEFENSE  
OFFICE OF GENERAL COUNSEL  
WASHINGTON, D. C. 20301

April 6, 1978

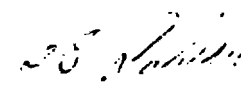
Honorable James T. McIntyre, Jr.  
Director, Office of Management  
and Budget  
Washington, D. C. 20503

Dear Mr. McIntyre:

The views of the Department of Defense have been requested on H. R. 3561, H. R. 3562, H. R. 3563, H. R. 3564 and H. R. 3565, 95th Congress. Each bill is entitled "To amend chapter 5, subchapter II, of title 5, United States Code, to provide for improved administrative procedures."

Advice is requested as to whether there is objection to the presentation of the attached revised report to the Committee.

Sincerely,

  
Werner Windus  
Director  
Legislative Reference Service

Enclosure



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE  
WASHINGTON, D. C. 20315

Honorable Peter W. Rodino, Jr.  
Chairman, Committee on Judiciary  
House of Representatives  
Washington, D. C. 20515

Dear Mr. Chairman:

Reference is made to your request for the views of the Department of Defense regarding H. R. 3561, H. R. 3562, H. R. 3563, H. R. 3564 and H. R. 3565, 95th Congress. Each bill is entitled "To amend chapter 5, subchapter II, of title 5, United States Code, to provide for improved administrative procedures."

The foregoing bills are directed toward one of the following three ends: (1) refinement of the administrative adjudicative function; (2) limitations on the release of information while an investigation is in process; or (3) diminishing the "military or foreign affairs function" exemption from the rulemaking procedures of the Administrative Procedure Act.

Changes in the adjudicative processes are contemplated by H. R. 3561, H. R. 3562, H. R. 3565 and the first three sections of H. R. 3563. Quasi-judicial procedures within the Department of Defense are presently exempt from the strictures of the Administrative Procedure Act. Nothing in these legislative proposals appears to seek a change in that exempt status. Therefore, as to the proposals relating to the administrative adjudication process, the Department defers to other agencies having a greater involvement with the problem.

Section 4 of H. R. 3563 proposes a new section to be added to subchapter II of chapter 5 of title 5, United States Code. The proposed addition would prohibit any agency from making any statement or releasing any document concerning or relating to an agency investigation or proceeding if the release might harm any person in business, property, or reputation, unless "the benefit to the public clearly exceeds the potential harm to the person adversely affected." The section further contemplates that the agency may release information to a person about whom the derogatory material relates. Finally, it authorizes civil

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action either in equity or by extraordinary legal remedies. It does not purport to amend the Federal Tort Claims Act to permit an action in damages for defamation.

We believe that section 4 of H.R. 3563 would not substantially alter present departmental policies and practices. In addition, it is doubtful that the proposal would have frequent application to the Department's operations. We therefore defer to other agencies having greater concern over the section.

Section 1, H.R. 3564, amends section 551(4) of title 5 United States Code, to divide the older definition of "rule" into distinct definitions of "rule" and "rulemaking and cognate proceedings." This can have little foreseeable impact on the Department of Defense. Accordingly, we defer to the Department of Justice and other agencies more directly concerned.

The apparent purpose of section 2 of H.R. 3564 is to give the public more notice and greater opportunity to participate in rulemaking. It seeks to accomplish that end by substituting for the blanket "military or foreign affairs function" exemption a narrow exclusion. This substitute measure, subsection 2(1) would only allow avoidance of the notice and public participation process if the subject matter of the proposed rule was classified pursuant to the standards set forth in an Executive order and such classification was in fact proper.

The provisions of section 2(1) would apply the standards of disclosure in the Freedom of Information Act to the rulemaking procedures of the Administrative Procedures Act. This provision could permit a litigant to halt issuance of a rule essential to national security on the basis that the classification was improper. Although the propriety of a classification may be germane to the ultimate release of a document under the Freedom of Information Act, it is ancillary to the necessity for promulgation of the rule. The swift and unencumbered issuance of rules covering both classified and unclassified matters is of paramount importance to our national defense. Any procedures that would create administrative delay in the promulgation or application of such rules would be harmful to the national defense. The public interest in proper classification is adequately served by the provisions for release of such information under the Freedom of Information Act.

The current exemption for matters involving a military or foreign affairs function has proved to be of great importance to the Department of Defense. The worldwide operations of the Department often call for expeditious guidance on matters essential to the national defense. Subordinate commands, in turn, frequently issue regulations interpreting Department of Defense Directives and establishing local policies. If all such directives were published for notice and public comment, action by the Department of Defense and its components would be hopelessly encumbered.

Section 2(3) of the bill, which includes national defense within the public interest exemption, provides insufficient protection for the national security interests of our country. The judicial tests used in applying the "public interest" exemption should not be imported into the field of national defense. Those charged with the responsibility for the national defense should not be placed in the position of weighing the public interest in notice and comment against the public interest in national defense; rather, the requirements of national security dictate that such policymakers have the authority to invoke the interest of national defense when they determine that such interest does not permit a waiting period for notice and comment.

In view of the foregoing, the Department objects to the provisions of H. R. 3564 that would equate the military and foreign affairs exemption with the public interest exemption. The Department recognizes that public participation in rulemaking can play an important role where expeditious promulgation is not required. The Department has adopted a procedure for such public participation. 32 CFR Part 296. The Department cannot support modification of the military and foreign affairs exemption unless the following provisions are incorporated into any change. First, there must be a blanket exemption for all classified matters. The propriety of the classification should not be imported into the rulemaking procedure; rather, it should be reserved for questions as to the release of documents under the Freedom of Information Act. Second, prepublication should not be required as a part of rulemaking by subordinate commands. Subordinate commanders must have the freedom to act expeditiously without being involved in notice and comment proceedings. Therefore, the prepublication requirements should be applied only to the executive headquarters of the Department of Defense and the Military Departments. The opportunity for the public to petition for issuance, amendment, or repeal of a rule can provide a sufficient mechanism for public participation at the local level. Third, rulemaking at the departmental level must not be inhibited by the

same "public interest" balancing test that is used in measuring the prepublication requirements in matters other than the national defense. Likewise, the determination as to whether the national defense interest requires the Department to forego prepublication should be left in the sole discretion of the Department, and should be reviewable only for a question of discretion. Use of an external standard such as the "good cause" requirement would place an unwarranted burden on the expeditious policymaking essential to the national defense.

Subsection (2) of section 2 of H.R. 3564 would repeal the exemption from the rulemaking procedures for matters relating to public property, loans, grants, benefits, and contracts. These constitute the so-called "proprietary exemption." The Department objects to this subsection when

viewed in the context of the other provisions of H.R. 3564. As previously noted, the national defense exemption in H.R. 3564 is not sufficient to meet the needs of national security. The Department would not object to repeal of the proprietary exemption if appropriate modifications were made in the national defense exemption as outlined above. Functions related to national defense, including proprietary functions, cannot be susceptible to inordinate administrative delays at times when expeditious action is required.

Accordingly, it is recommended that Section 2 of H.R. 3564 be modified as follows:

SEC. 2. Section 553 of title 5, United States Code, is amended as follows:

(1) Paragraph (1) of subsection (a) is amended to read as follows:

"(1) a matter pertaining to a military or foreign affair function of the United States that is kept secret in the interest of national defense or foreign policy pursuant to criteria established by Executive Order or statute.

"(2) a matter relating to agency management or personnel."

(2) The third sentence of subsection (b) is amended to read as follows:

"(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice:

"(B) when the agency for good cause finds that notice and public procedure thereon would be impracticable, unnecessary, or contrary to the public interest. The agency shall publish in the document promulgating each rule issued in reliance upon this provision either (i) the finding and a brief statement of reasons therefore, or (ii) a statement that the rule is within the category of rules established by a specified rule which has been previously published and for which the finding and statement of reasons have been made; or

"(C) in any other matter pertaining to a military or foreign affairs function of the United States when the agency finds that notice and public procedure thereon would be contrary to the interest of national defense or foreign policy. The agency shall publish in the document promulgating each rule issued in reliance upon this provision, either (i) the finding and a brief statement of reasons therefore, or (ii) a statement that the rule is within the category of rules established by a specified rule which has been previously published and for which the finding and statements of reasons have been made."

(3) Subsection (e) is redesignated as subsection (f).

(4) Section 553 is further amended by inserting immediately after subsection (d) the following new subsection:

"(e) In a matter pertaining to a military or foreign affairs function of the United States, subsections (b) - (d) do not apply to the Department of Defense except for rulemaking by the executive parts of the Department of Defense and the Military Departments."

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the committee.